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No. 370

In the Supreme Court of the United States

October Term, 1961

Chas. D. Sobbing, Petitioner

v.

United States of America

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief for the United States in Opposition

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 870

CARL D. SCHAEFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the court of appeals (Pet. App. 1a–13a; 13a–19a) are reported at 299 F. 2d 625.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1962. A petition for rehearing was denied on March 16, 1962. The petition for a writ of certiorari was filed on April 13, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals held that it was error for the trial court, sitting without a jury, to disqualify two defense witnesses who, in disobedience of its order

that all witnesses withdraw from the courtroom, were present during the taking of testimony but that this error did not taint the conviction under some counts of the indictment. The question presented is whether the facts support this conclusion.

STATUTE INVOLVED

Section 17(a)(1) of the Securities Act of 1933, as amended, 15 U.S.C. 77q(a)(1) provides:

> (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud * * *

Section 5(a)(2) of the Securities Act of 1933, 15 U.S.C. 77e(a)(2) provides:

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> * * * * * * *
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

STATEMENT

A twelve-count indictment returned in 1958 in the United States District Court for the Northern District of Illinois charged petitioner with ten counts of using the mails in the employment of a scheme to defraud in the sale of securities and with two counts

of using the mails to deliver an unregistered security in violation of the Securities Act of 1933 (15 U.S.C. 77q(a)(1) and 77e(a)(2) (App. 4–19)).[1] After a trial before the court petitioner was convicted on all counts. He was sentenced to imprisonment for one year "on each of Counts 1 to 6, * * * said sentences shall run consecutively;" and to imprisonment for one year "on each of Counts 7 to 12, * * * said sentences shall run concurrently with each other and concurrently with the sentences imposed on Counts 1 to 6 * * *" (App. 45). He was also sentenced to pay a fine of $1000 on each of the twelve counts (App. 44–46).

THE INDICTMENT AND TRIAL

The securities which were the subject of the indictment were contracts admitted by petitioner to be unregistered and within the purview of the Securities Act. By these contracts petitioner assigned to investors interests in royalties and profits which, he represented, would accrue to him as a result of the sale or lease of his invention. The invention was a machine which petitioner claimed would create steam by the action of shock waves in an enclosed body of water. The merits of the machine were not in issue.

The indictment charged 22 allegedly false misrepresentations relating to financial backing of the invention, including statements that a syndicate of companies comprised of Dow Chemical Company, the du Pont Company, Chrysler Corporation and General Motors Corporation, among others, had agreed to purchase rights to the machine and had put $10

[1] Citation is to the appendix filed by petitioner in the court of appeals and included as part of the record in this Court.

million in escrow with the Chase National Bank in New York City; that Fairbanks-Morse & Company and The Crane Company had each offered $1 million for the machine; that the United States Navy was interested in the machine and would pay varying amounts of $2 million or $30 million for it; and that petitioner had a document in the vault of the Northern Trust Company which gave him the same protection as a patent (App. 4–7). Each count of the indictment named a single investor who was the alleged victim of the misrepresentations.

At the outset of the trial the defense moved for sequestration of all witnesses. The court granted the motion and ordered any and all witnesses to leave the courtroom (App. 58). Subsequently, when the defense called two witnesses, Krieger and Reed, who had violated the sequestration order, the court, on objection by the government, refused to permit them to testify (App. 224, 226).

At the trial the eight investors named in the indictment plus eleven other investors (of the several hundred from whom petitioner had admittedly raised $2 million) testified as to representations made to them for the most part in conversations with petitioner and as to documents received from petitioner through the mail. The petitioner stipulated that if pertinent company representatives and Naval officers were called, they would testify that the Chase Manhattan Bank had never heard of petitioner, his machine or any escrow agreement relating thereto; that the various corporations named had never entered into dealings with petitioner or placed money in escrow to purchase a

machine from him; that the United States Navy had not heard of petitioner nor dealt with him; and that the Northern Trust Company had never heard of petitioner or acted as custodian of any documents for him (App. 21–28).

Petitioner's defense at trial was that any misrepresentations he had made were made in good faith in reliance on information given to him by others.

THE REVIEW BY THE COURT OF APPEALS

On appeal, the majority reversed six counts on the ground that the government's proof had failed to show that the misrepresentations charged in the indictment had been made to the particular investors named in those counts (Pet. App. 7a). It found the proof sufficient to support counts 3, 4, 5, 6, 11 and 12 (Pet. App. 7a, 9a), but set aside the convictions upon counts 4 and 5 on the ground that, as to the charges therein, the trial court's refusal to hear the testimony of two of petitioner's witnesses after their disobedience of the sequestration order[2] was prejudicial error. The majority stated that the record showed that one of the witnesses might have been present during conversations about which petitioner and one of his agents, who had been the only contact with the investors named in counts 4 and 5, gave conflicting testimony. Since the testimony of the witness might have resolved these conflicts, the court of appeals held it was prejudicial error not to hear him despite the absence of an offer of proof (Pet. App. 11a–12a).

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[2] These were the witnesses Krueger and Reed (see App. 222–224, 226–236).

The court unanimously affirmed the conviction on counts 3, 6, 11 and 12 (Chief Judge Hastings concurring, on the ground that it was not error to exclude the witnesses) (Pet. App. 12a, 15a). With respect to counts three and six, the majority held that there was no showing that either of the excluded witnesses was present when the misrepresentations were alleged to have been made. Nor was there any other showing, either on the face of the record or by an offer of proof, that their testimony would have been relevant and material. Under the circumstances the court held the exclusion harmless (Pet. App. 11a).

As to counts 11 and 12, involving the mailing of admittedly unregistered securities, the entire court rejected petitioner's contention that his testimony that a lawyer informed him that the contracts did not have to be registered provided him with a valid defense (Pet. App. 8a–9a). In view of this fact, the majority held that any error in refusing to hear one of the two witnesses who could have testified to the conversation could not have prejudiced petitioner as to these counts (Pet. App. 12a).

Chief Judge Hastings dissented from the reversals (Pet. App. 13a–19a). As to the matter of proof, he argued that it was not necessary to show that a particular victim was deceived if a scheme to defraud was shown to exist. With respect to the court's refusal to hear witnesses violating its exclusion order, he held that the matter was discretionary and that there had been no offer of proof showing the court's decision to be an abuse of discretion.

ARGUMENT

Since the majority of the court below held that the trial court abused its discretion in refusing to receive the testimony of two witnesses who disobeyed the order excluding prospective witnesses from the courtroom, the only issue which the petition presents is whether the court of appeals could properly find that this error did not taint the convictions under counts 3, 6, 11 and 12. We believe that on the facts here, the court's ruling that any error was harmless was amply justified.

I. COUNTS 3 AND 6

A. *The Government's evidence*

1. The witness Cohen, named as the investor victim in count 3 of the indictment, testified that he had met with petitioner upon two occasions in June and September 1954. He said that upon the first occasion and perhaps upon the second occasion, there was present, in addition to persons whom he named,[1] a worker for petitioner. He did not know the worker's name; he was "a little fellow, rather thin." He did not remember a man named Reed (App. 120, 122, 124).

Upon the first occasion, petitioner told Cohen that he was in the process of patenting his device piecemeal. He represented that he was negotiating with a syndicate which would pay $5 million down for

[1] Of the five other persons named by Cohen, the defense called only the petitioner. In addition to Cohen, the government called one other, an investor, who testified to misrepresentations made to him by petitioner. His testimony on direct and cross-examination was in no way inconsistent with Cohen's (App. ii–iv, 75–82, 120–127).

rights to the device for the purpose of supplying power to extract minerals from salt water, that he was expecting to close the deal shortly, "only a few months away," and that the investors would then receive a 10–1 return (App. 121), Cohen invested $1000. On the second occasion, when petitioner invited Cohen to invest more money, petitioner represented that the deal had been closed, that the money paid exceeded more than $5 million, and that the investors would be able to receive their money soon. Cohen never received back any part of his investment (App. 122).

2. The witness Dickinson, named as the investor victim in count 6 of the indictment, testified that when he met with petitioner and others in March 1953,* there was a gentleman present who apparently worked with petitioner. He did not know the man's name or age but he was a "little short fellow," "short and thin" (App. 137).

At the meeting petitioner represented to Dickinson that he had a patent on his device and that the Navy and Underwriter's Laboratory had approved it (App. 131, 137). He said that Western Electric and General Electric wanted to buy the device and that investors could expect a 10–1 return (App. 132). Dickinson invested $750 (App. 300).

B. Petitioner's defense

Petitioner admitted that he might have told Cohen that a syndicate of the big manufacturing companies

*Of four other persons identified by Dickinson as present, the defense called only the petitioner (App. ii–iv, 131).

would pay him $5 million down for rights to the machine (App. 254). He had reason to believe that the syndicate would do so within three or four months after June 1954 because one Bernier, an electrical engineer with whom he had a contract, told him so (App. 245, 246). His worker Krueger was present when Bernier told him this and so was a sales engineer Bandefob (who confirmed that Bernier made representations as to money sources) (App. 276). This conversation with Bernier at which Krueger was present took place in 1955 (App. 246).[5]

Petitioner said that he believed Bernier's representation that the syndicate was interested and had already deposited $10,000 in escrow in a bank to his credit, but he never checked with any of the named companies or the bank as to the truth of the assertion (App. 246, 250, 262, 263).

Petitioner also claimed to have had a "letter of intent" which he intended to deposit at the Northern Trust Company but which was actually put in the Bank of Chicago (App. 246–247). According to petitioner one way of protecting oneself on patent rights was by sending a letter through the mail to establish priority as of the date of the cancellation (App. 246). He addressed it to one Dr. Cremer and Dr. Cremer addressed it to him. No one at the Bank of Chicago ever saw the letter of intent (App. 260–261). He testified both that he had told someone that he had a basic patent and that he had never told anyone that

[5] The evidence showed that the misrepresentations alleged in count 3 occurred in June and September 1954 and in count 6 in March 1953 (*supra*, pp. 7–8).

he had a basic patent (App. 261). He said he still had not applied for a patent although he had been in the process of applying for a patent for a long time (App. 261).

Petitioner (according to his defense) had told the investor Dickinson that Western Electric and General Electric had made an offer for his machine and he honestly believed it (App. 255). He had never checked with anyone from Western Electric or General Electric regarding this purported interest (App. 261, 263). He had talked with some people whom Bernier brought to him and was told later they were from General Electric (App. 263).

He had told some other investors that the Navy was interested in his machine and was trying to buy it for the extraction of minerals from ocean water or to power submarines (App. 251, 257). This, he said, was based upon his conversations with men in uniform who represented themselves as a lieutenant, a captain and an admiral (App. 242–243, 245, 256, 260).

C. The testimony of the excluded witnesses could not have established petitioner's innocence

Petitioner has at no time, either at the trial, in the court of appeals, or in his petition, stated what the testimony of the two excluded witnesses would be. Instead, the petition asserts the fact that "the record reveals 51 page references to Krueger and 53 page references to Reed" (Pet. 5), and claims in general terms that the witnesses would corroborate testimony given by petitioner (Pet. 5–6). There is no indication that this corroboration would have been helpful in showing petitioner's "honest intent" (Pet. 7) in

making the misrepresentations specifically proven under counts 3 and 6."

Under counts 3 and 6 there were only two issues as to which the testimony could have been important: whether the allegedly false misrepresentations were made to investors Cohen and Dickinson; and, if so, whether petitioner made the misrepresentations in the good-faith belief that the statements were true. As shown above, as to counts 3 and 6, petitioner admitted making the misrepresentations to which investors Cohen and Dickinson testified. In view of his admissions, the testimony of either Krueger or Reed (the excluded witnesses) as to what was said at meetings between petitioner and these or any other investors (even assuming that Krueger and Reed were present) would have been immaterial.

As petitioner concedes, the "existence of [his] honest intent * * * was the key issue before the trial court * * *" (Pet. 7). Petitioner's defense was that

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[*] Petitioner makes the broad assertion (Pet. 7):

"* * * [Krueger and Reed] knew what Schaefer had heard from the people upon whose words Schaefer based his claim of financial backing. The record shows, in short, that Krueger and Reed knew about all there was to know about Carl D. Schaefer, his invention, its backers, and its investors. The existence of honest intent in Carl Schaefer was the key issue before the trial court, and Reed and Krueger were the only men who could give direct testimony as to the entire scope of Schaefer's actions."

As shown *infra*, p. 12 & n. 9, the record fails to support this claim with respect to counts 3 and 6.

[†] Petitioner had previously stipulated that the statements were false (see Statement, *supra*, pp. 4-5).

[‡] A review of the 51-page references to Krueger and 53 page references to Reed fails to establish that either was present when petitioner made the misrepresentations to Cohen and Dickinson.

he made the false misrepresentations in good faith reliance upon statements of financial backing made to him by others—essentially, a consulting engineer named Bernier (a witness for the government at the trial) and three purported Navy officials. To the extent that the excluded witnesses, long-time associates of petitioner, were present when third persons made such statements to petitioner, their testimony would have been relevant and might have corroborated his contentions. Nonetheless, its exclusion does not taint the convictions under counts 3 and 6. An analysis of petitioner's 104 record references fails to show that either Reed or Krueger could have testified to facts which could possibly afford an "honest" basis for more than one of the many misrepresentations made to Cohen and Dickinson.[9] Under the circumstances the

[9] The page references do not indicate that Reed was present when any statements were made by third parties to petitioner which would explain the misrepresentations he made to Cohen and Dickinson. With respect to Krueger, the record indicates that he may have been present at conversations between Bernier and petitioner in the winter of 1954 and in 1955 (App. 246) at which petitioner claimed that Bernier had made statements as to financial backing and the interest of a syndicate of large corporations in purchasing the machine (App. 245-246, 254, 258). Bernier, called as a rebuttal witness by the government, denied making such statements (App. 283-289). Despite this conflict, Krueger's testimony would have had no relevance to counts 3 and 6, since the conversations at which he was allegedly present occurred after petitioner's misrepresentations to Cohen and Dickinson. The record also establishes that in 1955 Krueger brought a purported navy captain to petitioner, who in turn produced persons who identified themselves as a lieutenant and an admiral, and that Krueger was present (App. 241) at their conversations with petitioner. Thus, of the many misrepresentations admittedly made by petitioner to Cohen and Dickinson, Krueger's testimony could possibly have explained only those concerning the interest of the Navy.

exclusion of the evidence was harmless error. The remaining count 3 and 6 misrepresentations are unimpeached and sufficient to support the conviction.

Even assuming that one or the other of the two witnesses would have testified that, some time prior to the date of petitioner's misrepresentations to Cohen and Dickinson, Bernier made to petitioner the statements that petitioner attributed to Bernier (a generous assumption since petitioner made no offer of proof as to their testimony), this would have had no real tendency to prove petitioner's good faith. First, the defense required the court to accept the inherently incredible contention that, during the several years he was collecting $2 million from hundreds of small investors, petitioner could have honestly believed representations by one man that the top giant corporations of the country (none of which, he stipulated at trial, had ever heard of him) had promised him or actually deposited to his credit millions of dollars without having checked the accuracy of any of these representations. But more than that, such reckless disregard of the truth or falsity of the representations made would in itself support a charge of fraud. *Pierce* v. *United States*, 252 U.S. 239, 251; *Cooper* v. *Schlesinger*, 111 U.S. 148, 155; *Baker* v. *United States*, 115 F. 2d 533, 541 (C.A. 8), certiorari denied, 312 U.S. 692; *Stone* v. *United States*, 113 F. 2d 70 (C.A. 6). Therefore, as indicated in the record, the testimony of either Reed or Krueger as to what some other person might have told petitioner could not have affected the court's finding of guilt and their exclusion was properly held harmless.

II. COUNTS 11 AND 12

The insignificance of the testimony of the witnesses is even more clearly apparent with respect to counts 11 and 12. There is no question that the contracts were securities, that the securities were not registered and that the securities were sent through the mails by petitioner. Petitioner's defense was that his lawyer (deceased at the time of the trial) (App. 257) told him that the contracts did not have to be registered—a fact which, even if it had been corroborated by a witness, would not, in the circumstances of this case, have constituted a defense. See *Linden* v. *United States*, 254 F. 2d 560, 568 (C.A. 4) (Pet. App. 8a-9a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1962.